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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955.

No. 767.

WM. H. FRANTZ, H. P. FRANTZ, J. J. McDEVITT, Individually and as Co-Partners Doing Business as FRANTZ EQUIPMENT COMPANY, a Co-Partnership,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH W. HENDERSON,
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1910 Packard Building,
15th and Chestnut Sts.,
Philadelphia 2, Pa.,

HARRY NORMAN BALL,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1955.

No. .

WM. H. FRANTZ, H. P. FRANTZ, J. J. McDEVITT, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FRANTZ EQUIPMENT COMPANY, A CO-PARTNERSHIP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners WM. H. FRANTZ and J. J. McDEVITT respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 2, 1955, in the cases of *United States of America v. Wm. H. Frantz, H. P. Frantz, J. J. McDevitt, Individually and as co-partners doing business as Frantz Equipment Company, a co-partnership, Wm. H. Frantz and J. J. McDevitt, Appellants,* No. 11,331; and your petitioner H. P. Frantz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third

Circuit entered on February 2, 1955, in the case of *United States of America v. Wm. H. Frantz, H. P. Frantz, J. J. McDevitt, Individually and as co-partners doing business as Frantz Equipment Company, a co-partnership, H. P. Frantz, Appellant*, No. 11,341; to the end that these cases may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals for the Third Circuit be reviewed by this Honorable Court and such other relief granted as this Court may deem proper.

OPINIONS BELOW.

The opinion of the District Court of June 28, 1950 (R. 20a) is reported in 91 F. Supp. 807; the opinion of the District Court of November 18, 1952 (R.* 26a) is unreported. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 1a-4a is reported in 220 F. (2d) 123.

JURISDICTION.

The judgment of the Court of Appeals was entered February 2, 1955, and is printed in Appendix B hereto, p. 6a *infra*. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS INVOLVED.

The Under Secretary of War on December 20, 1943, issued a unilateral order under the First Renegotiation Act determining that defendant partnership realized excessive profits for its fiscal year ended September 30, 1942. H. P. Frantz, one of defendant partners, was in the military service of the United States from October, 1942, until March, 1946, and had on October 20, 1943 objected to the renegotiation proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. The questions presented are:

*Citations preceded by "R." refer to pages of the Appendix for Appellants in the Court of Appeals.

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1. Whether a petition to the Tax Court of the United States for a de novo redetermination was for this partnership an optional procedure only.

2. Whether the proceedings before the Under Secretary of War leading to the unilateral determination, held to be final and unreviewable, were encompassed by the Soldiers' and Sailors' Civil Relief Act of 1940.

STATUTES INVOLVED.

The following provisions of the Sixth Supplemental National Defense Appropriation Act, 1942, as expanded by § 701(b) of the Revenue Act, 1943, are involved: § 403(c)(1), § 403(d)(1), § 403(d)(4), § 403(d)(5), § 403(e)(1), § 403(e)(2), 58 Stat. 21, 78, 82-83, 85, 86, 86-87, 87; 26 U. S. C. A. *Internal Revenue Acts Beginning 1940,* 491, 496-497, 500-502, 507-508. The following provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 are involved: § 100, § 101(4), § 102, § 201; 54 Stat. 1178, 1179, 1181.

All the above provisions are printed in Appendix C, *infra,* pp. 8a-14a.

STATEMENT.

A Complaint was filed by the United States against Frantz Equipment Company, a partnership, on July 28, 1945 (R. 6). The jurisdiction of the District Court was invoked because the case was brought pursuant to § 403 of the Renegotiation Act (R. 6). The United States sought to recover $58,815.80 on account of excessive profits allegedly realized by defendant partnership under the Renegotiation Act. The Complaint was based upon an order and determination of the Under Secretary of War, acting under the Renegotiation Act and pursuant to authority delegated to him, dated December 20, 1943, and determining that of the profits realized by defendants during its fiscal year ended September 30, 1942 on its contracts and sub-

contracts subject to renegotiation, $60,000 thereof were excessive (R. 6-7).

In its Answer to the Complaint defendant partnership: (a) denied that the Renegotiation Act was constitutional; (b) denied that its business was subject to the act; (c) denied the statements and conclusions contained in the unilateral order; (d) denied that the finding of excessive profits was duly determined; (e) alleged that the finding was made without due regard to important factors relating to the business of defendant partnership; (f) averred that the determination was made over the objection of H. P. Frantz, one of the partners who was in the military service of the United States during the proceeding; (g) denied that it gained excessive profits within the meaning of the act in the sum of $60,000 or any other sum (R. 11-13). H. P. Frantz, one of the defendants, filed his separate Answer alleging that prior to the issuance of the Order of the Under Secretary he had entered the military service of the United States; that he had applied to the Under Secretary of War for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, which application the Under Secretary denied; that on the date of the issuance of the said Order he was still in the military service of the United States (R. 15-17). This defendant entered the military service of the United States in October, 1942, and served within the territorial limits of the United States and in the European Theatre of Operations until March 15, 1946 (R. 15).

On June 28, 1950, the District Court denied the motions of the United States for summary judgment and for judgment on the pleadings (R. 20-23). The District Court held that Congress had not in the Revenue Act of 1943 made the determination of the Secretary final and conclusive, failing the contractor's petition to the Tax Court of the United States for a redetermination. The District Court held that under § 403(e)(1) and (e)(2) there was a distinction between orders issued by the War Contracts

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Price Adjustment Board after the enactment of the Revenue Act of 1943 and a determination which had been made by a Secretary prior to its enactment on February 25, 1944. The District Court held: that § 403(e)(1) by its own terms applies only to § 403(e)(1) and makes final and conclusive an order of such Board if such order is not appealed to the Tax Court of the United States; that § 403(e)(1) only applies to appeals from an order of the Board; that an order of the Board could only have been issued on or after February 25, 1944, the effective date of the Revenue Act of 1943, which act created the Board. The Court held that there is nothing in either the original Renegotiation Act, nor the Revenue Act of 1943, which makes the determination of a Secretary final and conclusive if an appeal is not taken to the Tax Court, for § 403(e)(1) does not apply to § 403(e)(2). The District Court concluded:

> "Therefore, I conclude that, as in this case, where the defendants' fiscal year ended September 30, 1942, the Under Secretary of War's determination was made on December 20, 1943, and the Revenue Act of 1943 was enacted on February 25, 1944, the determination of a Secretary is not final and conclusive, and the defendants in their defense may have it reviewed as a proceeding de novo.
>
> "The government urges that the case of Lichter, et al., doing business as Southern Fireproofing Co. v. United States, 334 U. S. 742, supports its position. The Lichter case involved three determinations by Secretaries which were made in September, October and December, 1944. Since those determinations were made after the enactment of the Revenue Act of 1943, the Supreme Court expressly acknowledged that the situation before me was not before them. Id. at 790. Therefore, any statements made by the Supreme Court regarding the finality of a Secretary's determination which comes within the scope of Subsection 403(e)(2)

are dicta, and I am not bound by the Lichter decision." (R. 22-23)

On November 18, 1952, the District Court, upon the motion of the United States to reconsider its earlier motion for summary judgment, denied on June 28, 1950, and to vacate the earlier order and to grant summary judgment in its favor (R. 24-25), reversed its earlier ruling. The District Court said:

> "Judge Bard in reaching his conclusion distinguished the present case from Lichter v. United States, 334 U. S. 742 (with particular reference to what the Court said about the Tax Court remedy, pp. 789-793). I do not think that the cases are distinguishable and, were I compelled to do so, I would have no hesitation in placing my decision upon the Lichter case. • • •
>
> "I am sure that had the case of Lincoln Electric Co. v. Knox, 77 F. Supp. 444, 334 U. S. 841, been called to Judge Bard's attention he would have decided otherwise. That case is precisely and in all respects on all fours with the present case. • • •
>
> • • •
>
> "The Lincoln Electric case is completely dispositive of the present case."

In ruling upon the defense of H. P. Frantz under the Soldiers' and Sailors' Civil Relief Act of 1940 the District Court held that the Secretary of War was not a "court", and that § 201 of the Act applied only to an action or proceeding in a court (R. 27).

Defendant partnership appealed to the Court of Appeals and defendant H. P. Frantz took a separate appeal (R. 29).

On February 2, 1955, the Court of Appeals affirmed the judgment of the District Court, holding that:

"It is argued that the finality provision of Section 403(c)(1) is not made applicable to determinations of the Secretary either by its own terms or by anything in Section 403(e)(2). It is also argued that the application of 403(c)(1) is limited by 403(c)(6) to determinations made for years ending after June 30, 1943.

"Whatever we might think of these arguments were the matter of first impression, we think they are foreclosed here by the decision of the Supreme Court in *Lichter v. The United States*, 1948, 334 U. S. 742, holding final, in the absence of appeal to the Tax Court, determinations made by the Secretary for years ending prior to July 1, 1943. We agree with the Court below that the instant case is not distinguishable from *Lichter* as urged by appellants, on the ground that in none of the *Lichter* determinations was the Secretary's determination itself made, as here, prior to the effective date of the Revenue Act of 1943. * * * We therefore hold that, under the *Lichter* case, the Under Secretary's determination in this case is final and conclusive in the absence of timely appeal to the Tax Court. It is not necessary to express any opinion whether the Supreme Court derived that finality from Section 403(c)(1) itself or from the Congressional intent subsequently indicated in providing the Tax Court remedy." (pp. 3a-4a *infra*)

In affirming the judgment of the District Court as to defendant H. P. FRANTZ the Court of Appeals said:

"Nor can we sustain the contention of appellant H. P. FRANTZ that the Under Secretary's determination was invalidated by Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, providing for a stay of any 'action or proceeding in any court' during and for sixty days after the military service of one involved there. The ordinary connotation of 'court',

used to describe a type of tribunal, is not broad enough to include a head of an executive department administratively determining excess [*sic*] profits on war contracts * * * Moreover in Section 101(4) of the Civil Relief Act, Congress explicitly provided that 'The term "Court" as used in this Act, shall include any court of competent jurisdiction of the United States or of any state, whether or not a court of record'. If Congress had thought that 'court' standing alone connotated any governmental agency whose determinations might affect the interests of persons in military service, there would have been no occasion for this explanation." (p. 4a *infra*)

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Court below has rendered an erroneous decision on the point expressly reserved by this Court in *Lichter v. United States,* 334 U. S. 742.

This Court, in *Lichter v. United States,* pointed out that all of the determinations in the three cases there involved (two by Secretaries and one by the Board) were made *after* the effective date of the Revenue Act of 1943, February 25, 1944, saying on page 790:

> "In addition to the above procedures affecting future determinations of excessive profits to be made by the Board, the Second Renegotiation Act also made express provisions, in § 403(e)(2), for a redetermination by the Tax Court of excessive profits determined to exist by the respective Secretaries. These provisions applied first to any determinations made by a Secretary *prior to* February 25, 1944, with respect to a fiscal year ending before July 1, 1943. In those instances a petition for redetermination by the Tax Court was permitted to be filed within 90 days after February 25, 1944. **We have no such case before us.** * * *" (334 U. S. at 790) (Emphasis supplied)

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The instant petition involves the very case excluded by this Court from the area of its decision in *Lichter v. United States.*

Since this Court in *Lichter v. United States* decided nothing with respect to the unilateral order of a Secretary made *prior* to February 25, 1944, for a fiscal year ended prior to July 1, 1943, the Court below, it is submitted, erred in holding that:

> "* * * The instant case is not distinguishable from *Lichter* * * *" (p. 3a *infra*)

and in holding that:

> "* * * whatever we might think of these arguments were the matter of first impression we think they are foreclosed here by the decision of the Supreme Court in *Lichter v. United States* * * *". (p. 3a *infra*)

The Court below held itself bound by the decision of this Court in *Lichter v. United States.* It did not feel that it could render an opinion upon the merits of the contentions put forth by petitioners below because it felt those contentions were:

> "* * * foreclosed here by the decision of the Supreme Court in *Lichter v. United States* * * *." (p. 3a *infra*)

Lichter v. United States was not decided by a unanimous Court; two members of the Court dissented.[1] The district court in the instant case, moreover, in its first decision did accept the petitioners' contentions; it reversed its position later in reliance upon *Lichter v. United States* and *Lincoln Electric Co. v. Forrestal.* While the Court of Appeals felt that *Lichter v. United States* was binding upon

1. Mr. Justice Murphy concurred in the result in the three cases; Mr. Justice Jackson concurred in the result in the *Pownall* case, and dissented in the *Lichter* and *Alexander* cases; Mr. Justice Douglas dissented in the *Lichter* case (dissenting in part, 334 U. S. at 802).

it, it rejected the district court's reliance upon *Lincoln Electric Co. v. Forrestal.* Since this Court carefully defined [2] the area of adjudication in *Lichter v. United States,* the Court of Appeals erroneously felt itself foreclosed by the decision of this Court in *Lichter v. United States.* We feel that this Court, the sole spokesman of the significance of its decision in *Lichter v. United States,* should grant the petition in order to finally settle the meaning of its Opinion in *Lichter v. United States,* and the further question whether for contractors circumstanced as were defendants, a petition for a de novo redetermination in the Tax Court provided for by the Revenue Act of 1943, was an "* * * optional or alternative procedure * * *"[3] merely, or whether it was a mandatory procedure and the failure to pursue such procedure automatically converted the unilateral order of the Under Secretary of War (which this Court characterized as a "claim"[4] only) into a final and unreviewable judgment against all defendants.

2. A question of importance, it is believed, in the administration of the Soldiers' and Sailors' Civil Relief Act of 1940 is also presented. H. P. Frantz, one of the defendant partners, was in the military service during the proceedings leading up to the promulgation of the unilateral order of the Under Secretary of War, and also at the time when, it was held by the Court below, the said order became final and unreviewable as to all defendants, 90 days after the effective date of the Revenue Act of 1943. This defendant applied to the Under Secretary of War for a stay of proceedings under the Civil Relief Act, which application was denied. The record does not show the circumstances surrounding nor the reasons for this denial.

2. 334 U. S. 746, 790-793 *passim.*

3. 334 U. S. at 792.

4. "* * * the Government, in the absence of such an agreement, might *announce* its unilateral determination of the amount of excessive profit *claimed* by the United States. * * *" 334 U. S. at 791. (Emphasis supplied.)

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Suit was instituted by the United States in the district court on July 28, 1945 (R. 1) at a time when defendant H. P. Frantz was still in the military service of the United States. When, on March 15, 1946, he left the military service the suit was pending against him. Having chosen the district court as the forum in which to pursue its claim against him, the United States, nevertheless, has contended that H. P. Frantz, as well as the other defendants, were compelled to petition the Tax Court for a de novo redetermination under pain of having the unilateral order of the Under Secretary transmuted, 90 days after the effective date of the Revenue Act of 1943, into a final and absolutely unreviewable judgment.

In the District Court litigation one of H. P. FRANTZ'S grounds of defense was that the renegotiation proceedings and hearings by the Under Secretary resulting in a finding entered against the partnership of which he was a member were proceedings in prejudice to the civil rights of this defendant under the Civil Relief Act of 1940, and that the failure of the Under Secretary to suspend such proceedings during his absence in the military service of the United States was contrary to the provisions of the Civil Relief Act (R. 17).

The Court below considered that the Under Secretary of War did not fall within the ordinary connotation of "court" nor within the Congressional definition of "court" as used in the Civil Relief Act.

The Under Secretary in issuing an order in the instant case which has been held to be final and unreviewable and which adjudged the existence of a debt from the defendants to the United States, it is felt, was exercising *judicial* power.

Therefore, an important question is posed—whether the Congress intended in the Civil Relief Act of 1940 to encompass within its provisions those persons or tribunals which though not specially called "courts" exercise judicial powers. Insofar as the decision of the Court below has

given a constricted meaning to the term "court" as used in the Civil Relief Act, that decision conflicts directly in principle with the decisions of this Court announcing a policy of liberal construction of the Civil Relief Act to effectuate the broadly articulated Congressional purposes. *Boone v. Lightner,* 319 U. S. 561; *Le Maistre v. Leffers,* 333 U. S. 1.

CONCLUSION.

For the reason that the Court below erroneously decided the point expressly reserved by this Court in *Lichter v. United States,* and for the further reason that the Court below has decided an important question in the administration of the Soldiers' and Sailors' Civil Relief Act in a way which conflicts in principle with the applicable decisions of this Court and conflicts with the broad congressional purposes embodied in that Act, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH W. HENDERSON,
GEORGE M. BRODHEAD,
HARRY NORMAN BALL,
Counsel for Petitioners.

May 3, 1955

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APPENDIX A.

Opinion of Court of Appeals for Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,331

UNITED STATES OF AMERICA

v.

WILLIAM H. FRANTZ, H. P. FRANTZ, J. J. McDEVITT, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FRANTZ EQUIPMENT COMPANY, A CO-PARTNERSHIP

WILLIAM H. FRANTZ AND J. J. McDEVITT, APPELLANTS

No. 11,341

UNITED STATES OF AMERICA

v.

WILLIAM H. FRANTZ, H. P. FRANTZ, J. J. McDEVITT, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FRANTZ EQUIPMENT COMPANY, A CO-PARTNERSHIP

H. P. FRANTZ, APPELLANT

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 16, 1954
Before GOODRICH, STALEY and HASTIE, *Circuit Judges*

OPINION OF THE COURT
(Filed February 2, 1955)

By HASTIE, *Circuit Judge.*

These are two appeals from summary judgment for the United States in its suit under the Renegotiation Act[1] to recover excessive profits found by the Under Secretary of War to have been realized by appellant partnership on certain war contracts.[2] Appellants contend that the District Court ered in holding that, except for timely appeal to the Tax Court as authorized by statute but not taken here, the Under Secretary's determination was not subject to judicial reexamination. Appellant partner H. P. Frantz advances the additional contention, based on the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 1181, 50 U.S.C. App. §§ 501, 521, that the proceedings to redetermine profits were invalid because conducted during his absence in military service.

The Under Secretary's determination of excess profits was made on December 20, 1943, for appellants' fiscal year ending September 30, 1942. The Renegotiation Act of 1942, as amended, which was in effect at that time, made no provision for judicial review of such determinations. The Revenue Act of 1943, 58 Stat. 21, 78-93, 50 U.S.C. App. § 1191, effective February 25, 1944, extensively amended the Renegotiation Act of 1942 providing, *inter alia,* for a War Contracts Price Adjustment Board to share with the appropriate cabinet officer in the determination of excess profits, and for review of excess profits determinations by

---

1 Act of April 28, 1942, c. 247, Title IV. § 403, 56 Stat. 226, 245-246, as amended by the Act of October 21, 1942, c. 619, Title VIII, § 801 (a-c), 56 Stat. 798, 982-985; Act of July 1, 1943, c. 185, § 1, 57 Stat. 347-348; Act of July 14, 1943, c. 239, §§ 1-4, 57 Stat. 564-565; Act of February 25, 1944, c. 63, Title VII, § 701(b), 58 Stat. 21, 78-93; now codified as 50 U.S.C. App. § 1191.

2 The government sued for $60,000 the amount of excessive profits found by the Under Secretary, less certain credits which the government owed to appellants. The judgment below was for $26,426.07, the amount which a Special Master appointed by the Court reported the parties to have agreed upon as a correct computation of the unpaid balance of the government's claim.

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the Tax Court. Two subsections provide for Tax Court review: Section 403 (e)(1) for review of Board determinations, and 403 (e)(2) for review of the Secretary's determinations, whether made before the enactment of the Revenue Act of 1943 for a year ended prior to July 1, 1943, or made after enactment of the Revenue Act of 1943. Both subsections provide that petition for redetermination "may" be made to the Tax Court, within ninety days after mailing of the notice of the determination order or, where the determination was made by the Secretary before enactment of the Revenue Act of 1943, within ninety days after enactment of that Act. Section 403 (c)(1) makes final and conclusive a determination of excess profits where no timely appeal is taken to the Tax Court, at least where the determination was made by the Board for a year ending after June 30, 1943. The question before us is whether such finality also extends to a determination made by the Under Secretary for a year ending prior to July 1, 1943. We think that it does.

It is argued that the finality provision of Section 403 (c)(1) is not made applicable to determinations of the Secretary either by its own terms or by anything in Section 403 (e)(2). It is also argued that the application of 403(c)(1) is limited by 403(c)(6) to determinations made for years ending after June 30, 1943. Whatever we might think of these arguments were the matter of first impression, we think they are foreclosed here by the decision of the Supreme Court in *Lichter v. United States*, 1948, 334 U.S. 742, holding final, in the absence of appeal to the Tax Court, determinations made by the Secretary for years ending prior to July 1, 1943. We agree with the Court below that the instant case is not distinguishable from *Lichter* as urged by appellants, on the ground that in none of the *Lichter* determinations was the Secretary's determination itself made, as here, prior to the effective date of the Revenue Act of 1943. Section 403 (e)(2) specifically makes appeal to the Tax Court available whether the determina-

tion was made by the Secretary before or after February 25, 1944, the only distinction being the necessary one as to the time for taking such appeal. We therefore hold that, under the *Lichter* case, the Under Secretary's determination in this case is final and conclusive in the absence of timely appeal to the Tax Court. It is not necessary to express any opinion whether the Supreme Court derived that finality from Section 403 (c)(1) itself or from the congressional intent subsequently indicated in providing the Tax Court remedy.[3]

Nor can we sustain the contention of appellant H. P. Frantz that the Under Secretary's determination was invalidated by Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, providing for a stay of "any action or proceeding in any court" during and for sixty days after the military service of one involved there. The ordinary connotation of "court", used to describe a type of tribunal, is not broad enough to include a head of an executive department administratively determining excess profits on war contracts. Cf. *Mulhearn v. Federal Shipbuilding and Dry Dock Co.*, 1949, 2 N.J. 356, 66 A.2d 726. Moreover, in Section 101 (4) of the Civil Relief Act, Congress explicitly provided that "The term 'court', as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record." If Congress had thought that "court" standing alone connoted any governmental agency whose determinations might affect the interests of persons in military service, there would have been no occasion for this explanation.

---

3 House Report No. 871, 78th Cong., 1st Sess., accompanying the bill which became the February 25, 1944 amendment, stated that "Under existing law there is no right of appeal or review whereby the contractor may have the question of his excessive profits redetermined.

"Your committee bill establishes this right both as to renegotiation adjustments already made, and renegotiation adjustments in contracts entered into after June 30, 1943 . . ."

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This consideration seems to have been the basis of decision in the only federal case we have discovered directly in point. *Polis v. Creedon,* E.C.A. 1947, 162 F.2d 908. We conclude that the Civil Relief Act does not apply to the Secretary's determination in this case.

The judgment will be affirmed.

APPENDIX B.

Judgment of Court of Appeals for Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.

UNITED STATES OF AMERICA

v.

WILLIAM H. FRANTZ, H. P. FRANTZ, J. J. McDEVITT, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FRANTZ EQUIPMENT COMPANY, A CO-PARTNERSHIP

No. 11,331

WILLIAM H. FRANTZ and J. J. McDEVITT, APPELLANTS

No. 11,341

H. P. FRANTZ, APPELLANT

ON APPEAL FORM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

February 2, 1955.

RECEIVED & FILED FEB. 2, 1955.

IDA O. CRESKOFF,
Clerk.

APPENDIX C.

Statutory Provisions Involved.

Revenue Act of 1943.

* * *

SEC. 701. RENEGOTIATION OF WAR CONTRACTS

(a) TERMS USED.—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. * * *

* * *

"(c)(1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order de-

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termining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e)(1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

* * *

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or sub-

contracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B) do not exceed $500,000. and under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

* * *

"(d)(1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board') which shall consist of six members. One of the members shall be an officer or employe of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employe of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employe of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employe of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employe of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employe of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive

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additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

• • •

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

"(5) The chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency, or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determination, or at the request of the contractor or subcontractors made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination

shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

• • •

"(e)(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with the Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by The Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120 and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid

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out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5)(B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

* * *

"(l) This section may be cited as the 'Renegotiation Act'.

• • •

(d) EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a)(4)(C), (a)(4)(D), (i)(1)(C), (i)(1)(D), (i)(1)(F), (i)(3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e)(2) to section 403 of such Act shall be effective from the date of the enactment of this Act."

Soldiers' and Sailors' Civil Relief Act of 1940.

SEC. 100. In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

* * *

SEC. 101. * * *

(4) The term 'Court' as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

* * *

SEC. 102. (1) The Provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, including the Philippine Islands while under the sovereignty of the United States and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.

* * *

SEC. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

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No. 767

In the Supreme Court of the United States

October Term, 1954

Wm. H. Frantz, H. P. Frantz, J. J. McDevitt, Individually and as Co-Partners Doing Business as Frantz Equipment Company, a Co-Partnership, Petitioners

United States of America

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief for the United States in Opposition

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Solicitor General

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Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 767

WM. H. FRANTZ, H. P. FRANTZ, J. J. MCDEVITT, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS FRANTZ EQUIPMENT COMPANY, A CO-PARTNERSHIP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 26a–27a),[1] granting summary judgment for the United States, is not reported.[2] The opinion of the Court of Appeals (Pet. App. 1a–5a) is reported at 220 F. 2d 123.

[1] All "R." references are to the pages of the Appendix Record printed for the use of the court below and filed with the petition pursuant to Rule 21 of this Court.

[2] An earlier opinion of the District Court (R. 20a–23a) is reported at 91 F. Supp. 807.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1955 (Pet. App. 7a). The petition for a writ of certiorari was filed on May 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

On December 20, 1943, the Under Secretary of War determined in a unilateral renegotiation order that petitioners' partnership had realized excessive profits of $60,000 for its fiscal year ending September 30, 1942. Under Section 403 (e) (2) of the Second Renegotiation Act, passed February 25, 1944, petitioners, within 90 days after that enactment date, could have filed a petition in the Tax Court for redetermination of their excessive profits. The questions presented are:

1. Whether petitioners' failure to petition the Tax Court renders the Under Secretary's renegotiation order final and conclusive, so that petitioners are barred from attacking the Under Secretary's determination in the Government's suit to collect the excessive profits so determined.

2. Whether the "stay" provisions of Section 201 of the 1940 Soldiers' and Sailors' Civil Relief Act, which govern "any action or proceeding in any court," apply to the administrative proceeding leading to issuance of the Under Secretary's renegotiation order.

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STATUTES INVOLVED

1. The Second Renegotiation Act (Act of February 25, 1944, Title VII, 58 Stat. 21, 78–92, 50 U. S. C. App. 1191) provides in pertinent part:

> SEC. 701. RENEGOTIATION OF WAR CONTRACTS.
>
> * * * * *
>
> (b) RENEGOTIATION OF WAR CONTRACTS. Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:
>
> "SEC. 403. * * *
>
> * * * * *
>
> "(e) (2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to

the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

2. The 1940 Soldiers' and Sailors' Civil Relief Act (Act of October 17, 1940, as amended, 54 Stat. 1178, 56 Stat. 769, 770, 50 U. S. C. App. 501, *et seq.*) provides in pertinent part:

SEC. 101. * * *

* * * * *

(4) The term "court", as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

* * * * *

SEC. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as

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plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

* * * * *

SEC. 205. The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service * * *.

STATEMENT

This is a collection suit by the United States to recover the excessive profits which the Under Secretary of War had determined petitioner Frantz Equipment Company had received during its fiscal year ending September 30, 1942, in con-

nection with certain World War II contracts.

The Company sells and rents road-building machinery (R. 11a). Prior to April 30, 1942, it was operated by William H. Frantz as a sole proprietorship (R. 6a, 11a). On that date it became a partnership, comprised of William H. Frantz and his two new partners, J. J. McDevitt and H. P. Frantz (R. 6a, 11a, 15a). H. P. Frantz, one of the new partners who joined the firm on April 30, 1942, after seven months of its 1941–1942 fiscal year had elapsed, entered the military service in October 1942 and served until March 15, 1946 (R. 16a).

On December 20, 1943, the Under Secretary of War, acting under the First Renegotiation Act,[3] determined, in a unilateral order, that the Company had realized excessive profits of $60,000 for its fiscal year ending September 30, 1942 (R. 8a–10a). While the First Renegotiation Act contained no provision for review of such an order, Section 403 (e) (2) of the Second Renegotiation Act, passed on February 25, 1944, provided that any unilateral order issued prior to February 25, 1944, with respect to a fiscal year ending before July 1, 1943, was reviewable in the Tax Court upon the filing of a petition within 90 days after February 25, 1944. *Supra,* p. 3. However, no petition was ever filed in the Tax Court by the present petitioners (R. 12a, 15a).

[3] Section 403, Sixth Supplemental National Defense Appropriation Act, approved April 28, 1942, 56 Stat. 226, 245.

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On July 28, 1945, the United States filed its complaint in the United States District Court for the Eastern District of Pennsylvania to recover the excessive profits determined by the Under Secretary, less applicable credits [4] (R. 1a, 6a–7a). The Company's answer, filed March 8, 1946, admitted its failure to file a petition for review in the Tax Court and asserted that the Renegotiation Act was unconstitutional (R. 11a–14a). Petitioner H. P. Frantz filed a separate answer on April 15, 1946, about a month after termination of his military service (R. 2a, 15a–17a). His answer asserted *inter alia* that the failure to stay, for the period of his military service, the Departmental proceedings leading to issuance of the Under Secretary's unilateral order was contrary to the provisions of the Soldiers' and Sailors' Civil Relief Act (R. 16a–17a).

The Government moved for summary judgment (R. 19a). The motion, at first denied, was, on reconsideration, granted by the District Court (R. 20a–23a, 26a–27a). The Court of Appeals affirmed, ruling, as had the District Court, that (1) under *Lichter* v. *United States,* 334 U. S. 742, the failure to seek Tax Court review made the Under Secretary's unilateral determination final and conclusive, and (2) that the "stay" provisions of Section 201 of the Soldiers' and Sailors'

[4] While the gross amount of excessive profits was $60,000, applicable credits reduced the amount due the United States to $26,426.07 (R. 29a).

Civil Relief Act apply to "court" proceedings and not to an administrative determination of excessive profits on war contracts. (Pet. App. 2a–5a.)

ARGUMENT

The basic holding of both courts below was that petitioners' failure to seek a Tax Court redetermination made the Under Secretary's order, even though it antedated the Second Renegotiation Act, final and conclusive. Petitioners apparently do not challenge the soundness of this holding *per se*. Instead, their main contention, arising out of the unique set of facts here involved, is that the holding places improper reliance on *Lichter* v. *United States,* 334 U. S. 742. No similar claims or cases—involving a failure to seek Tax Court review of a unilateral determination made prior to February 25, 1944, with respect to a fiscal year ending before July 1, 1943—are pending. The main issue raised here is thus narrow and of no general importance in the renegotiation field. Moreover, the lower courts' holding on this question, their reliance on *Lichter,* and their ruling as to the nonapplicability of the "stay" provisions of Section 201 of the Soldiers' and Sailors' Civil Relief Act are, we submit, plainly correct. Accordingly, further review by this Court does not appear to be warranted.

1. Section 403 (e) (2) of the Second Renegotiation Act expressly authorizes the filing of a petition for a redetermination in the Tax Court

of Departmental unilateral orders concerning fiscal years ending before July 1, 1943. *Supra,* p. 3. With respect to Departmental orders issued after February 25, 1944, the enactment date of the Second Renegotiation Act, Section 403 (e) (2) permits the filing of such a petition within 90 days after the date of the order. The same 90-day period is made available by another portion of the same Section 403 (e) (2) to those contractors whose excessive profits were determined in an order issued before February 25, 1944. Contractors in this second category were permitted to file their petitions within 90 days after February 25, 1944.

In *Lichter,* this Court held that the failure of the contractor to seek the Tax Court redetermination made available to him by Section 403 (e) (2) rendered the Departmental order final and conclusive and not subject to *de novo* redetermination in the District Court. 334 U. S. 742, 753–754, 789–793. It is true that the Departmental orders involved in *Lichter* had been issued after February 25, 1944, so that under Section 403 (e) (2) the 90-day period began to run from the date of the orders. Accordingly, as petitioners point out (Pet. 8), this Court noted in *Lichter* that it did not have before it a case, like the instant one, where the Departmental order had been issued prior to February 25, 1944, and where the 90-day period therefore began to run, under

Section 403 (e) (2), on that date. 334 U. S. at 790.

A reading of the *Lichter* opinion makes it clear, however, that the difference in dates was noted by the Court for a single purpose: to identify the precise portion of Section 403 (e) (2) under which that case fell. It in no way implied that the Court would have reached a different result had the 90-day period begun on a different date. To the contrary, it is plain from the *Lichter* opinion that the underlying consideration on which the Court based its holding was the contractor's failure to invoke the Tax Court remedy despite its availability to him under Section 403 (e) (2). That consideration is as fully applicable here as in *Lichter*. In both cases, Section 403 (e) (2) made available the Tax Court remedy by the filing of a petition within the prescribed 90-day period. And in both cases, the remedy, while fully available, was ignored. The courts below, therefore, correctly viewed *Lichter* as controlling and dispositive of the instant case.[5]

[5] The District Court's opinion, after observing that *Lichter* and the instant case are indistinguishable, points out that the difference in the dates when the 90-day period begins is a "difference which has nothing to do with the point here at issue and which does not make what the Court said in its [*Lichter*] opinion inapplicable to the present case" (R. 26a). In affirming, the Court of Appeals "agree[d] with the court below that the instant case is not distinguishable from *Lichter*" on the ground of difference in dates of the Secretary's orders (Pet. App. 3a). The correctness of this conclusion is still further confirmed by *Lincoln Electric*

2. Petitioners' remaining contention is that the Under Secretary violated the "stay" provisions of Section 201 of the Soldiers' and Sailors' Civil Relief Act in refusing to suspend the administrative proceedings leading to the unilateral renegotiation order until the separation of one of the partners, H. P. Frantz, from military service. The short and conclusive answer to this contention, as noted by both courts below (R. 27a; Pet. App. 4a) is that Section 210 (*supra,* pp. 4–5) is in terms expressly limited to "any action or proceeding in any *court*" (emphasis added), and hence has no application to an administrative proceeding conducted by the Under Secretary. See Section 101 (4), *supra,* p. 4; *Polis* v. *Creedon,* 162 F. 2d 908, 911 (E. C. A.).

It should also be noted that H. P. Frantz's military service from October 1942 to March 15, 1946, did not curtail his right to file a petition in the Tax Court. Normally, the 90-day period allowed by Section 403 (e) (2) of the Second Renegotiation Act with respect to the unilateral order in this case would have expired 90 days after February 25, 1944. However, under Section 205 of the Soldiers' and Sailors' Civil Relief Act—which,

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Co. v. *Forrestal,* 334 U. S. 841, a *per curiam* decision expressly relying on *Lichter* even though, as the three-judge District Court's decision makes clear (77 F. Supp. 444, 445), the unilateral determination of Lincoln Electric Company's excessive profits was made, as in the instant case, prior to February 25, 1944. Accord: *Spaulding* v. *Douglas Aircraft Co.,* 154 F. 2d 419, 426–427 (C. A. 9).

unlike Section 201, does in terms apply to proceedings before administrative bodies as well as courts—the running of the 90-day period was tolled, with respect to H. P. Frantz, for the period of his military service. *Supra,* p. 5. Under Section 205, he could have filed a Tax Court petition within 90 days after March 15, 1946, when he was separated from the military service. His failure to do so can no more be attributed to his military service than can the earlier failure of his co-partners who were running the business in his absence.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1955.

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